Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2000

COLORADO DEPARTMENT OF CORRECTIONS, and MARGARET HEIL, in her individual and official capacity,

Petitioners,

vs.

JOHN H. CHAMBERS,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether prison officials must conduct an administrative proceeding before classifying an inmate as a sex offender.

2. Whether prison officials must give earned time credits (discretionary credits given to inmates who make progress in rehabilitative programs) to an inmate who refuses to participate in sex offender treatment because he refuses to admit that he is a sex offender.

3. Whether an inmate may litigate issues #1 and #2 in three successive actions despite the prison's reliance on the principles of *collateral estoppel* and *res judicata* at all stages of the proceedings.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 205 F.3d 1237 (10th Cir. 2000). A copy of the Opinion is included in Appendix B at B-1. The Opinion of the District Court for the District of Colorado is included in Appendix C at C-1.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on March 7, 2000. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by the United States Court of Appeals on April 17, 2000 (Appendix A). This Petition for Writ of Certiorari is

filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § § 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amdt. 14, 1 Due Process Clause

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

John Chambers was arrested in 1983 for sexual assault. However, in a witnessed, signed statement, the victim wrote:

> I'm dropping charges because I feel I have no chance to win the case in court. His lawyer would make him look innocent and me be the dog which he is the one. If you let him back on the street there will be another victim.

As a result, the charges were dismissed without prejudice. Subsequently, Chambers received a 39-year sentence for unrelated charges. In 1989, the Colorado Department of

Corrections ("CDOC") classified Chambers as S-4, category S41 ("Arrested or Investigated for Sex Offense"), an inmate with a history of sex offense behavior without a conviction of a sex offense. In 1989 and 1991, Chambers was considered for placement in the Sex Offender Treatment Program ("SOTP"), but was ruled ineligible because he denied committing a sexual offense. In 1992, his new case manager noted the police report in the file and recommended evaluation for participation in the SOTP. Chambers completed a questionnaire for review, but was rejected for participation because he refused to admit that he had committed any sexually assaultive behavior. Because Chambers is not participating in a SOTP, the case manager recommended that Chambers be given 7 days of earned time credit per month rather than the maximum possible award of 10 days.

Chambers filed a complaint in United States District Court ("Chambers I"). Chambers argued, *inter alia,* that the "requirement" to admit his guilt as a condition to entry in the SOTP violated the Due Process Clause because it deprived him of his "entitlement" to additional earned time credit credits. The district court's dismissal of the complaint was affirmed by the United States Court of Appeals on October 28, 1994,

On March 16, 1995, Chambers filed a complaint in a Colorado district court ("Chambers II") against the CDOC and two Chambers I employee-defendants. Chambers argued that his classification as a sex offender violates the Due Process Clause. He further argued that his classification caused him to suffer the stigma of being labeled a sex offender. He also argued that the denial of additional earned time credits due to non-participation in a SOTP caused an

"extension" of his parole eligibility date. Finally, he argued that his classification as a sex offender prevented him from progressing below a "medium" security classification. On June 13, 1995, the state court dismissed the complaint because *res judicata* bars relitigation of the claims in state court. The Colorado Court of Appeals affirmed.

Undeterred, Chambers filed this complaint ("Chambers III"), raising the same arguments. On November 22, 1996, the District Court granted the CDOC's motion for summary judgment. Although the Court rejected the CDOC's defense of *res judicata*, the District Court held that Chambers did not have any entitlement to any particular classification or placement. On January 6, 1999, the Court of Appeals for the Tenth Circuit remanded the decision for fact-finding. On November 23, 1999, the District Court entered its order with those additional facts. On March 7, 2000, in a published opinion, the Court of Appeals reversed the summary judgment and ordered that summary judgment enter in favor of Chambers. The Court held that an inmate is entitled to due process before he is classified as a sex offender due to the "stigmatizing consequences" of such a classification. The Court further ordered that earned time credits could not be withheld from Chambers without some administrative process finding him to be a sex offender. On April 17, 2000, the Court of Appeals denied the CDOC's Petition for Rehearing *En Banc* without comment.

ARGUMENT FOR GRANTING WRIT

There have been no stigmatizing *consequences* to justify judicial interference in the CDOC's decisions concerning classification and earned time. The ruling by the Court of Appeals conflicts with prior decisions from this

Court which hold that matters of prison classification and placement are solely within the purview of prison officials. The decision has created a new layer of administrative process in the prisons only five years after this Court attempted to put an end to such judicial tampering with prison disciplinary decisions in *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293 (1995).

In the alternative, Chambers claims are barred by *collateral estoppel* and *res judicata*. An inmate should not be encouraged to forum shop in the hope that repetitive filings will eventually find a receptive court.

ARGUMENT

I. THE CDOC'S MANAGEMENT OF CHAMBERS DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

A. Chambers Is Not Entitled To Judicial Review Of His Classification

While the record demonstrates a rational basis for the CDOC's classification of Chambers as a sex offender, no rationale, justification or process is required. The vague term "due process" is not an invitation to expansive interpretations of law or intrusive interference in prison operations. In and of itself, the Due Process Clause affords inmates very few entitlements:

> We have repeatedly said both prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain

> only a *narrow range of protected liberty interests.* As to the first point, we have recognized that broad discretionary authority is necessary because the administration of a prison is "at best an extraordinarily difficult undertaking" . . . . As to the second point, our decisions have consistently refused to recognize more than *the most basic liberty interests in prisoners.* "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

Hewitt v. Helms, 459 U.S. 460, 467, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983) (emphasis added) (citations omitted). "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Meachum v. Fano*, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451 (1976). "'[A]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight.'" *Hewitt v. Helms*, 459 U.S. at 468.

"Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling v. United States*, 493 U.S. 342, 352, 110 S.Ct. 668, 674 (1990). Any entitlement must stem directly from the Due Process Clause or from federal or state law. *Sandin v. Conner*, 515 U.S. at 483-84. There is no legitimate claim unless the claim arises from one of those sources. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989). A person must

have more than a mere "need," "desire" or "hope" in order to have a "liberty interest" protected by the Due Process Clause. *Id.* He must demonstrate that he has a "legitimate claim of entitlement" to the right asserted in the complaint. *Id.*

The Due Process Clause does not create any entitlement to a particular classification. *Moody v. Daggett*, 429 U.S. 78, 88 n.9, 97 S. Ct. 274, 50 L.Ed.2d 236 (1976). The State has the power to classify for whatever reason it desires, *or for no reason at all. Id.*; *Meachum v. Fano*, 427 U.S. 215, 223-28 (1976); *Olim v. Wakinekona*, 461 U.S. 238, 245, 103 S. Ct. 1741 (1983); *Montayne v. Haymes*, 427 U.S. 236, 242, 96 S. Ct. 2543, 49 L. Ed. 2d 466 (1976).

Colorado has not created a liberty interest in classification. *Milligan v. Colorado Department of Corrections*, 751 P.2d 75, 76 (Colo. App. 1988). "[I]nmate classification decisions are within the discretion of Department of Corrections officials . . ." *Id. See also, Andretti v. Johnson*, 779 P.2d 382, 384 (Colo. 1989) (Colorado law does not create any liberty interest in any particular security classification).

Because there is no legitimate claim of entitlement, there is no right to a hearing or other procedural due process prior to denial of the non-entitlement. *See Meachum v. Fano*, 427 U.S. at 223-27; *Olim v. Wakinekona*, 461 U.S. 238, 250-51, 103 S. Ct. 1741 (1983). This is so even if the action involves "substantially burdensome consequences." *Montayne v. Haymes*, 427 U.S. 236, 242-43, 96 S. Ct. 2543 (1976)

B. Chambers Is Not Entitled To Earned Time Credits

The only other consequence of refusal to participate in sex offender treatment is receipt of 7 days of earned time credit per month rather than the maximum possible award of 10 days. No credits previously awarded to Chambers have ever been withdrawn. He is simply not being given additional credits. "Earned time" is a type of sentence reduction credit which *may* be awarded by the CDOC for "substantial and consistent progress" in work programs, job training, group living, and "participation in counseling sessions and involvement in self-help groups." Sections 17-22.5-302 and § 17-22.5-405, Colo. Rev. Stat. *See Rather v. Suthers*, 973 P.2d 1264, 1266 (Colo. 1999). It is a reward for an inmate's effort and progress in rehabilitation. Earned time is not a gift, nor is it an entitlement.

There is no federally-created entitlement to earned time credit. *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). Although Colorado statutes make an inmate eligible for a deduction from his sentence for progress in rehabilitation, they do not confer an entitlement. *Rather v. Suthers*, 973 P.2d at 1266. "[T]he department of corrections retains the authority to grant or deny the award of earned time credits". *Meyers v. Price*, 842 P.2d 229, 232 (Colo. 1992).

The Colorado Supreme Court's interpretation of Colorado law is dispositive as to its meaning and application and is controlling in federal court. *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). That interpretation is also consistent with the language used in the Colorado earned time statutes, each of which use

discretionary language and which set no parameters to bind the hands of the prison officials who make the decision. For example, section 17-22.5-302, Colo. Rev. Stat., states:

> **§ 17-22.5-302. Earned time:**
>
> (1) In addition to the good time authorized in section 17-22.5-301, earned time, not to exceed thirty days for every six months of incarceration, *may* be deducted from the inmate's sentence upon a demonstration to the department by the inmate that he has made *substantial and consistent progress in each* of the following categories:
>
> ...
>
> (c) *Participation in counseling* sessions and involvement in self-help groups;
>
> ...

(emphasis added). In 1990, the Colorado General Assembly revised the "earned time" statute by increasing the maximum amount of earned time credit that could be awarded from 5 days per month (30 days per 6 months) to 10 days per month. However, the discretionary language was left unchanged, as was the lack of parameters:

> Earned time, *not to exceed* ten days for each month of incarceration or parole, *may* be deducted from the inmate's sentence upon a demonstration *to the department* by the *inmate*, which is *certified* by the inmate's case manager or parole officer, that he has made consistent progress in the following categories

as required by the department of corrections: . . . .

Section § 17-22.5-405(1), Colo. Rev. Stat. (Emphasis added). Both statutes state that earned time "may" be deducted. The statutes do not specify which programs the inmate shall be required to enter in order to obtain credits. There is nothing in either statute to indicate that rehabilitation programs must be based solely upon the offenses for which the inmate is incarcerated. Neither statute precludes the CDOC from requiring an inmate to participate in an SOTP, even though the inmate has never been convicted of a sex offense. Further, the CDOC has the final say whether the inmate has made a satisfactory demonstration of "consistent progress." Even "if" consistent progress is shown in "each" of its four rehabilitation categories, "an" earned time award shall be awarded "not to exceed" a maximum number. The only limitation on agency discretion is the establishment of a cap beyond which the CDOC cannot grant additional credits. No minimum number is mandated, even if the inmate makes substantial and consistent progress. Such unfettered discretion cannot create an entitlement.

Chambers never had a right to any earned time credit. Earned time credit is neither automatic nor is it presumed. It has to be earned. Chambers refuses to do what is required in order to earn the credit. In effect, what he wants is "unearned time". In Colorado, there is no such thing. If the CDOC cannot withhold privileges from those who refuse to earn them, they become entitlements, not privileges.

Because Chambers has no right to receive earned-time credits, he must participate in a SOTP if he desires the privilege of receiving additional earned-time credits. *White*

v. People, 866 P.2d 1371, 1373-74 (Colo. 1994). Chambers is free to refuse to accept the offered treatment. In that case, it is rational for the CDOC to refuse to grant him privileges. The CDOC is merely stating that *if* Chambers desires privileges, such as lower security classification and additional discretionary credits, he must participate in a SOTP. The State may withhold a privilege from an offender who refuses to cooperate with penal authorities. *See, e.g. Minnesota v. Murphy*, 465 U.S. 420, 436, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984). The denial of a privilege due to an inmate's refusal to participate in rehabilitative or other programs is neither punitive nor a denial of due process. *Grenemyer v. Gunter*, 770 F. Supp. 1432 (D. Colo. 1991), *aff'd*, 968 F.2d 20 (10th Cir. 1992); *Johnpoll v. Thornburgh*, 898 F.2d 849, 851 (2d Cir. 1990), *cert. denied,* 498 U.S. 819 (1990). The limitation of privileges for failure to participate in a voluntary rehabilitation program (sex offender treatment) does not violate the Due Process Clause. *Searcy v. Simmons*, 68 F. Supp.2d 1197 (D. Kan. 1999).

C. The "Stigma" Of Being Labeled A Sex Offender Does Not Create Any Entitlements

Despite the lack of any right to judicial oversight over classification and earned time, the Court of Appeals adopted the holding in *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997), which holds that an inmate could not be classified as a "sex offender" without being convicted of a sex offense. Relying primarily on *Vitek v. Jones*, 445 U.S. 480 (1980), the Ninth Circuit concluded that labeling an inmate as a sex offender and requiring him to participate in a SOTP in order to be eligible for parole were almost identical to labeling an inmate as mentally ill and transferring him to a mental

hospital for involuntary psychiatric treatment. *Neal* 131 F.3d at 828-29. However, the cases are not analogous.

Classifying Chambers as a sex offender and refusing to award him additional credits is not remotely similar to summarily transferring an inmate to a mental hospital for involuntary psychiatric treatment beyond the terms of his original sentence. Chambers will not be held beyond the length of the sentence imposed by the sentencing court, nor is he required to undergo any treatment. He is merely being denied the privileges of early parole eligibility, early release, and transfer to a lower security prison.

There is nothing unconstitutional about the CDOC's policy decision to counsel inmates who might benefit from sex offender treatment. Past conduct may be considered in making placement and rehabilitation decisions. *Hernandez v. Johnston*, 833 F.2d 1316 (9th Cir. 1987); *Wilkerson v. Maggio*, 703 F.2d 909, 911 (5th Cir. 1983); *Andretti v. Johnson*, 779 P.2d at 383. The prior conduct to be considered need not be conduct proven beyond a reasonable doubt. There is no precedent which holds that prison officials must tailor their rehabilitative programs to the specific convictions obtained against particular inmates. Courts have never attempted to supervise prison officials to ensure that only persons convicted of a sex offense were encouraged to participate in SOTPs, any more than courts have held that only persons convicted of crimes related to drug or alcohol use may be placed in prison substance abuse programs. To the contrary, the State may consider dismissed charges in making discretionary decisions to confer or deny privileges. *See, e.g., Robinson v. Hadden*, 723 F.2d 59 (10th Cir. 1983), *cert. denied*, 466 U.S. 906 (1984); *Fiumara v. O'Brien*, 889 F.2d 254, 257 (10th Cir. 1990), *cert. denied*, 495 U.S. 958 (1990);

Lewis v. Beeler, 949 F.2d 325 (10th Cir. 1991), *cert. denied*, 504 U.S. 922 (1992). The CDOC need not wait until a specific crime occurs before it takes preventative measures. It could require every prisoner to take an SOTP if it wished (and if it had the resources).

The State may consider an inmate's arrest record in making its placement and earned time decisions. For example, the Colorado Parole Board may consider *any* factors it believes necessary to prevent recidivism. § 17-2-201(5)(f)(1)(1), Colo. Rev. Stat.; § 17-22.5-404(2)(a), Colo. Rev. Stat. It may require inmates to complete literacy programs, whether or not inability to read and write was the cause of the inmate's crime. § 17-22.5-404(2)(a)(XIII), Colo. Rev. Stat. It may require inmates to complete alcohol and drug counseling whether or not alcohol or drugs contributed to the offense. § 17-2-201(5)(f)(I)(D) and (H), Colo. Rev. Stat. It may require an inmate to enroll in education or technical training, or to seek gainful employment in the prison system, whether or not unemployment contributed to the causes of the crime. § 17-22.5-404(2)(a)(V) and (VI), Colo. Rev. Stat. There is no reason why the CDOC may not make the same considerations when it makes its rehabilitative decisions. It may attempt to "correct" problems that may interfere with rehabilitation, even if those problems were not the cause of his imprisonment.

In *Neal*, the consequence for the inmate if he did not participate in a treatment program was a complete loss of his parole eligibility. *Id.*, 131 F.3d at 824 and at 830. Chambers has never alleged that he has been denied parole eligibility.[1]

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[1] Chambers is not even eligible for parole at this time. Whether he will ever be paroled, and whether SOTP would

The only consequences alleged are refusal to award additional earned time credits and refusal to transfer him to a lower security prison. Nothing has been taken away from him.

Chambers alleges his classification has caused him "stigma". However, stigma alone does not invoke the protections of the Due Process Clause. The inmate must demonstrate that the classification has caused stigma *plus* some loss of entitlement or significant consequence. *Sandin v. Conner*, 515 U.S. at 479, n. 4; *Siegert v. Gilley*, 500 U.S. 226, 233-34, 111 S.Ct. 1789, 1794 (1991). Stigma by itself related to classification as a sex offender does not state a valid cause of action. *See Boling v. Romer*, 101 F.3d 1336, 1341 (10th Cir. 1996). The only "consequences" suffered by Chambers caused by his classification is placement in a medium security facility and refusal to award 3 additional days of earned time per month. Neither consequence has extended his confinement, nor has either created a significant and atypical condition of confinement. *Sandin v. Conner*, 515 U.S. at 485-86 (placement in punitive segregation was not significant and atypical); *Talley v. Hesse*, 91 F.3d 1411, 1413 (10th Cir. 1996) (Administrative segregation is neither an atypical nor significant experience). If segregation is not significant, still less is confinement in medium security.

Neither placement nor denial of additional discretionary earned time credits meets the "stigma plus" test. To infer a liberty interest beyond the bounds of the due process clause "would subject to judicial review a wide spectrum of discretionary actions that traditionally have been

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be a prerequisite for parole, is speculative. *Sandin v. Conner*, 515 U.S, at 483-84.

the business of prison administrators rather than of the federal courts." *Meachum v. Fano*, 427 U.S. at 225. Decisions regarding Chambers' classification, placement and earned time are not significant enough consequences to require procedural due process protections. He will not be held beyond his sentence. He will not be compelled to undergo treatment. He will be allowed to see the Parole Board when he reaches his statutory parole eligibility date.

Chambers never had a right to have that date accelerated by the award of additional earned time, nor does he have a right to better placement before he is paroled. Denial of earned time does not extend Chambers' parole eligibility date or sentence discharge date; it leaves these dates where they have always been. The same is true of classification and placement. Chambers has not even served enough time to meet with the Board yet. When he has, the Board may deny parole because Chambers has refused SOTP treatment or perhaps it will not.[2] The parole board is not required to deny parole if an inmate has refused sex offender therapy. *White v. People*, 866 P.2d at 1371. At this point, the effect of the CDOC policy on the Parole Board's decision is speculative.

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[2] "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). No state has a duty to establish a parole system. *Id.* In Colorado, parole is discretionary for offenders, such as Chambers, who have been sentenced as habitual offenders. *Thiret v. Kautzky*, 792 P.2d 801 (Colo. 1990). Whether parole is granted depends upon a number of factors subject to the parole board's ultimate discretion. *Meyers v. Price*, 842 P.2d 229 (Colo. 1992).

Sandin v. Conner, 515 U.S. at 486-87. There has been no showing of "stigma plus". Chambers has no valid due process claim.

Unlike the Tenth Circuit, the Ninth Circuit recognizes the limits of its ruling in *Neal v. Shimoda*:

> The liberty interest implicated by the **establishment** of the *SOTP is not merely the requirement that sex offenders complete the specified treatment program. If that were all that was at stake, we could probably not say that a liberty interest had been created, given the fact that prisons frequently maintain treatment and behavioral modification programs (such as anger management or alcohol abuse classes) that have long withstood legal challenge*. The liberty interest at stake in this case is similar in form and scope to the interest at stake in *Vitek*: 'the stigmatizing consequences of the attachment of the sex offender' label *coupled with* the subjection of the targeted inmate to a *mandatory treatment program whose successful completion is a precondition for parole eligibility* create the kind of deprivations of liberty that require procedural protections.

131 F.3d at 830 [emphasis added].

The CDOC's interpretation of *Neal v. Shimoda* has been confirmed by the United States District Court for the Southern District of California, which held that classification of an inmate as a sex offender, with a resultant loss of family

visitation, did not violate the Due Process rights of an inmate who had never been convicted of a sex offense, because that classification was not coupled with any mandatory or coercive treatment. *Cooper v. Garcia*, 55 F. Supp.2d 1090, 1100-02 (S.D. Cal. 1999). To invoke the protections of the Due Process Clause, an inmate must demonstrate that the classification has caused stigma *plus* some loss of entitlement or significant consequence. *Sandin v. Conner*, 515 U.S. at 479 n. 4; *Siegert v. Gilley*, 500 U.S. 226, 233-34, 111 S.Ct. 1789, 1794 (1991). Stigma related to classification as a sex offender, without more, does not create a cause of action. *Boling v. Romer*, 101 F.3d 1336, 1341 (10th Cir. 1996).

In contrast to inmate Neal, who lost his prior entitlement to see the parole board, Chambers has lost nothing to which he ever had an entitlement. The ruling of the Court of Appeals appears to be based on a feeling that classification of an inmate who was not convicted of a sex offense would be unfair. However, individual philosophic notions of "fairness" should not be imposed on prison administrators. *Dowling v. United States*, 493 U.S. at 352. In the absence of an entitlement created by federal or state law, the State's policy violates the Due Process Clause only when it violates those "fundamental concepts of justice on which our institutions are founded" and that define the community's sense of fair play and decency. *Id.* None are present here. The Due Process Clause does not justify interference with the prison officials' broad administrative and discretionary authority over the institutions they manage. *Hewitt v. Helms*, 459 U.S. at 467. The federal judiciary is not designed to micromanage day-to-day prison activities nor guarantee prisoner preferences over those of prison officials. *Sandin v. Conner*, 515 U.S. at 482-83. The CDOC's

classification of Chambers as a sex offender does not violate any federal or state law nor create a significant and atypical condition of confinement. *See Id.* The Appellate Court's conclusion that denial of the opportunity to accelerate the parole eligibility date "extends the sentence" is speculative because, even with an earlier parole eligibility date, there is no guarantee of parole. *Id.*, 515 U.S. at 486-87. Therefore, the CDOC's actions should not be subject to judicial oversight. *Id.*

To infer a liberty interest beyond the bounds of the Due Process Clause "would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Meachum v. Fano*, 427 U.S. at 225. Decisions regarding classification, placement and earned time are not significant enough consequences to require procedural due process protections, regardless of any stigma Chambers may feel. His 39-year sentence has not been increased, nor will he be denied his right to see the Parole Board when he reaches his parole eligibility date. There is nothing significant or atypical about denial of rehabilitation credits for a prisoner who does not participate in a rehabilitation program. Denial of additional credits does not meet the "stigma plus" test.

II. ALLOWING CHAMBERS TO RE-LITIGATE HIS CLAIMS WILL INCREASE INMATE LITIGATION AND WILL ENCOURAGE INMATES TO FORUM SHOP.

Chambers's challenges to the CDOC's classification and earned time decisions were raised and resolved in his

two earlier suits. Nevertheless, the Court of Appeals failed to grant (or even discuss) the State's defense of *collateral estoppel* and *res judicata*. The basis for the Court's omission is unclear. Chambers's argument that the State waived the defense by failing to file a cross-appeal after the District Court granted summary judgment on the merits is unsupported by *Pietrowski v. Town of Dibble*, 134 F.3d 1006, 1008 (10th Cir. 1998), which holds that an appellate court may affirm a district court's order on any grounds supported by the record, including grounds not relied upon by the district court. An appellate court *may* affirm a district court's order of dismissal based on *res judicata* even if the lower court did not rely on that defense when it dismissed the complaint. *Heimbach v. Chu*, 744 F.2d 11, 13 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (*citing Helvering v. Gowran*, 302 U.S. 238, 245 (1937). Any ruling requiring the prevailing party to file a cross-appeal to preserve its right to assert every defense it raised below would impede judicial economy. Therefore, the defense should be addressed.

Collateral estoppel is also known as "issue preclusion". *United States v. Mendoza*, 464 U.S. 154, 158 n.3 (1984). The doctrine states that the final decision of a court on an issue actually litigated and determined is conclusive in any subsequent suit, even one involving a different cause of action. *Id.*, at 158. *Collateral estoppel* bars relitigation of an issue if: (1) the issue is identical to that actually adjudicated in a prior proceeding; (2) the party against whom estoppel is asserted was a party or in privity with a party in the proceeding; (3) there was final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issues in the prior proceeding. *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980). These elements are all present in the three suits

filed by Chambers. All three involve the argument that he cannot be classified as a sex offender when he has never been convicted of a sex offense. All three claim that his classification stigmatizes him. All three challenge the denial of the maximum possible award of earned time credits due to his refusal to enter the SOTP. Chambers was the plaintiff in all three cases and, as such, is governed by the adverse rulings against him. *Allen v. McCurry*, 449 U.S. at 95.[3] Each order was a final judgment on the merits, precluding re-litigation of the same issue in a different forum. *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979). Therefore, c*ollateral estoppel* bars re-litigation of the earned time issue.

Re-litigation of the classification issue is barred by the principle of *res judicata* ("claim preclusion"). "Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been* raised in that action." *Allen v. McCurry*, 449 U.S. at 94 [emphasis added]. *Res judicata* pertains when the subsequent litigation concerns the same subject matter and cause of action as the previous adjudication, a final judgment was entered on the merits, and the party against whom the doctrine is asserted was a party in the earlier action. *Montana v. United States*, 440 U.S. at 153. *Res judicata* precludes the assertion of any issue that could have been asserted in the previous action, even if it was not

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[3] The CDOC, as the agency for whom the defendants worked, was in privity with its employee-defendants in each suit. *See Lowell Staats Min. Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1276 (10th Cir. 1989) (a corporation necessarily acts through its agents and shares the same interests when they are sued).

actually asserted. *Id.* "[A] judgment on the merits concludes the parties not only as to issues actually resolved, but also as to all matters germane to the general issue which could or might have been litigated therein." *Ballas v. Cladis*, 167 Colo. 248, 256, 447 P.2d 224, 228 (1968), *cert denied,* 395 U.S. 921 (1969). The doctrine is designed to protect adversaries from the expense and vexation attending multiple lawsuits. *Montana v. United States*, 440 U.S. at 153. It applies to suits filed under 42 U.S.C. § 1983. *Allen v. McCurry*, 449 U.S. at 96-102.

Claims arising out of the same operative nucleus of facts are barred in a second suit. *Kale v. Combined Ins. Co. of America*, 924 F.2d 1161, 1166 (1st Cir. 1991), *cert. denied,* 502 U.S. 816 (1991). Substantially similar acts occurring over a period of time constitute one transaction, or a series of connected transactions, and are one cause of action. *Restatement (Second) of Judgments,* § 24, Comment a (1982). A single cause of action includes all or any part of the transaction, or a series of connected transactions, out of which the action rose. *Restatement (Second) of Judgments*, § 24(1). A series of connected transactions is to be determined by whether the facts are related in time, space, origin, or motivation, and whether they form a convenient trial unit. *Restatement (Second) of Judgments,* § 24(2). "[A]s long as the 'new complaint grows out of the same transaction or series of connected transactions as the old complaint,' the causes of action are considered to be identical for *res judicata* purposes." *Kale v. Combined Ins. Co. of America*, 924 F.2d at 1166 (citations omitted). Actions which "seek redress for essentially the same basic wrong" advance the same cause of action. *Id.*

A "claim" includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Restatement (Second) of Judgments*, § 24(1) (1982). Comment c to § 24 notes that "[W]here one act causes a number of harms to, or invades a number of different interests of the same person, there is still but one transaction; a judgment based on the act usually prevents the person from maintaining another action for any of the harms not sued for in the first action." A party cannot convert his claim into multiple claims merely by asserting different legal theories in different actions. The claim remains one claim, and one transaction "although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different assures of liability or different kinds of relief." *Id.*

The importance of *res judicata* is forcefully demonstrated by these three suits. Chambers filed three complaints concerning his classification as a sex offender and the "requirement" that he enroll in a SOTP. All three suits concern the same subject matter and are filed against employees of the same state agency by the same plaintiff. All three suits assert that classification of Chambers as a sex offender violates the Due Process Clause, creates the stigma of being labeled a sex offender, and imposes "sanctions," identified as withholding of earned time credits, inability to obtain an earlier parole eligibility date without those credits, and ineligibility to receive a lower security classification. There is identity of parties in the suits. Finally, the cause of action was the same in each case. Chambers I protests the consequences of his classification and the effect on earned time credit. Chambers III protests the classification itself,

with the same goal of changing those consequences. Chambers cannot protest the CDOC's actions again merely by altering his argument. A party cannot re-file a cause of action by altering the legal theory on which he relied in the earlier action. "The 'same claim or cause of action' requirement is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies." *State Engineer v. Smith Cattle, Inc.*, 780 P.2d 546, 549 (Colo. 1989).

This case is also barred by the dismissal in Chambers II. A federal court must give to a state court judgment "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892 (1984). The principles of *collateral estoppel* and *res judicata* apply in § 1983 suits brought in federal court after an action has been brought in state court. *Id.*, 465 U.S. at 83.

It is immaterial that the remedy Chambers seeks is slightly different in each case. *Shaoul v. Goodyear Tire & Rubber, Inc.*, 815 P.2d 953, 954-55 (Colo. App. 1990), *cert. denied* (1991). Chambers could have requested a new classification in Chambers I when he sought increased earned time credits. Each case has been based upon his unwillingness to participate in sex offender treatment for the 1983 arrest. Since the cause of action arose out of the same set of operative facts (or "core facts"), changing the theory of the case, or the remedy sought, does not allow re-litigation of the claim. *Id.* Claims arising out of the same operative nucleus of facts are barred in a second suit. *Kale v. Combined Ins. Co. of America*, 924 F.2d at 1166.

Litigants should not be permitted to reassert claims merely by using slightly different phrasing in their pleadings. "To preclude parties from contesting matters that they may have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. at 153-54. The judgment in favor of Chambers here impairs the CDOC's interests established by Chambers I and II.

Both *collateral estoppel* and *res judicata* are "fundamental precepts" of the common law. *Montana v. United States,* 440 U.S. at 153. "Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Id.* Both doctrines are essential tools to foster judicial economy and to protect parties from the expense and vexation that comes from repetitive litigation. *Id.*, at 153-54. Chambers was required to consolidate all of his challenges to CDOC's action, and to present all grounds for relief, in one proceeding. His failure to do so bars his suit here.

CONCLUSION

The decision contained in *Chambers v. Bachicha*, #93-1233 (Chambers I) (Appendix H) is correct and should have been followed. Chambers is not entitled to re-litigate these matters. The CDOC has complete discretion over classification and the award of earned time credits. Chambers has no right to be re-classified, nor does the CDOC have any duty provide any process to justify its

classification. It also has no duty to award the maximum earned time credits when the inmate is not making the maximum efforts toward rehabilitation. The opinion of the United States Court of Appeals should be reversed and remanded with direction to reinstate the original order of dismissal.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN H. CHAMBERS, Plaintiff – Appellant v. COLORADO DEPARTMENT OF CORRECTIONS and MARGARET HEIL, in her individual and official capacity Defendants – Appellees.	No. 97-1023

ORDER
Filed April 17, 2000

Before **PORFILIO, HOLLOWAY and HENRY,** Circuit Judges.

Appellees Margaret Heil and Colorado Department of Corrections' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk Of Court
BY:
/s/
Deputy Clerk

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOHN H. CHAMBERS, Plaintiff-Appellant. v. COLORADO DEPARTMENT OF CORRECTIONS; MARGARET HEIL, in her Individual and Official Capacity, Defendants-Appellees.	No. 97-1023

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 95-Z-2028)

OPINION ON REMAND

Richard Byron Peddie and Catherine A. Hance, Frascona, Joiner & Goodman, P.C., Boulder, CO, for Plaintiff-Appellant.

Ken Salazar, Attorney General, and Paul S. Sanzo, First Assistant Attorney General, Denver, CO, for Defendants-Appellees.

Before **HENRY, HOLLOWAY, and PORFILIO,** Circuit Judges.

PORFILIO, Senior Circuit Judge

CHAMBERS III

The questions presented here are whether the Colorado Department of Corrections Sex Offender Component classifying John H. Chambers a sex offender and requiring his participation in the Sexual Offender Treatment Program (SOTP) violates the Ex Post Facto Clause and implicates a liberty interest under the Due Process Clause of the Fourteenth Amendment. We affirm, in part, and reverse, in part.

Mr. Chambers, an inmate in the custody of the Colorado Department of Corrections (CDOC), began serving a thirty-nine year sentence for aggravated robbery and attempted theft in 1985.[1] In 1987, CDOC Health Services classified Mr. Chambers as a Sexual Offender, S-2, [Exh. 9], based on the Sex Offender Component of its Risk Assessment Management Program (RAMP) then in effect.[2][Exh. 8]. The program targeted its mission "to identify and provide specialized supervision and treatment for high-risk assaultive offenders." Noting the high rate of recidivism of the sex offender population, the program sought to "identify, track, treat and supervise sex offenders in order to reduce risk to the community. "The program categorized sex offenders based on their criminal history. The S-2 sex offender "committed a sex offense but was not convicted of a sex offense charge."[3]

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[1] We have previously set forth some of the procedural and factual history, *Chambers v. Colorado Dep't of Corrections,* 166 F.3d 1220 (10th Cir. 1999) (unpublished) *(Chambers III).*

[2] The Sex Offender Component was part of CDOC Administrative Regulation (A/R) *600-1* promulgated in 1985 by the CDOC for the classification of inmates.

[3] S-1 is an inmate convicted of a sex offense charge; and S-3 inmates "exhibited sex offense behavior while incarcerated."

Despite Mr. Chambers' S-2 classification CDOC did not commence its prescribed sex offender treatment at that time. That treatment, including participation in group therapy, is conditioned upon the inmate's admitting he committed a sex offense; stating he has a problem in this area, and demonstrating his willingness to work on the problem. Instead,. according to CDOC Progress Assessment Summary sheets, Mr. Chambers completed his GED, a basic and advanced welding class, a basic mental health program, was assigned as a law librarian in 1991, and was report free, and definitely not considered a management problem."[4] Presumably based on this conduct, Mr. Chambers continued to receive good time and earned time credits totaling ten days a month.

In 1992, however, Ms. Phyllis Bachicha a CDOC case manager, reviewed the file and discovered a police report indicating that in 1983, the year before his present sentence of conviction, Aurora, Colorado police arrested Mr. Chambers and charged him with first degree sexual assault. The report included the victim's account of the alleged rape and sodomy and Mr. Chambers' contrasting story. Statements from both the victim and Mr. Chambers converged only upon the facts the two were living together for perhaps a month and had been drinking on the night of the alleged assault. Mr. Chambers insisted the sex was consensual, and the police evidently were unable to establish otherwise. Although the hospital report listed multiple bruises the victim sustained, police were unable to confirm details of the assault she described.[5] The police report noted detectives advised the victim that she would have to testify

[4] The reports also noted, however, Mr. Chambers was ineligible for SOTP because he refused to acknowledge his problems in this area.
[5] For example, the victim told the police Mr. Chambers tied her to the bed although the bed she pointed out had no posts or other railings. The victim then stated she did not remember because it was dark.

in a trial to the court and "it would be brought out during trial that she had been living with the victim [sic] and that she had had intercourse with him before. Victim became upset and stated that if that were the case, that she would drop the charges." [Exh. 3]. The victim then wrote and signed a statement to that effect.[6]

At oral argument before this panel, the State acknowledged its decision to pursue treatment under the program for Mr. Chambers was based on the victim's affidavit. Following Ms. Bachicha's review, Mr. Chambers submitted another questionnaire denying his alleged sexually assaultive behavior, thus signifying his "ineligibility" to participate in the program.[7] Because Mr. Chambers did not participate in the program, Ms. Bachicha recommended reducing the monthly ten days of earned time credit he received to seven days.

This three-day reduction based on his refusal to accept the classification of sex offender triggered the series of lawsuits Mr. Chambers then filed. As we noted in ***Chambers III***, in his first federal lawsuit. Mr. Chambers, *pro se*. alleged the loss of earned time credits based on the

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[6] The affidavit stated, "I'm dropping charge because I feel I have no chance to win this case in court. His lawyer would make him look innocent & me be the dog which he is the one. If you let him back on the streets there will be another victim."

[7] In 1989, an SOTP case manager interviewed Mr. Chambers and denied his eligibility to participate in the program because he denied having committed a sexual assault. [Exh. 12 In 1991, Gloria Green, another case manager, submitted an individual contact report on Mr. Chambers, stating the SOTP team "examined police reports which clearly describes [sic] a sexual assault. We continue to recommend SOTP for him & that earned time be withheld for not being involved." [Exh. 14]. Ms. Green also recommended moving Mr. Chambers from Fremont Correctional Facility, a medium security facility, to another prison to make room for those eligible to participate in the SOTP.

classification violated his right to due process and equal protection and privilege against self-incrimination. We affirmed that dismissal upon finding earned time credits were a matter of discretion and could not support a constitutional claim. *Chambers v. Bachicha,* 39 F.3d 1191 (10th Cir. 1994) (unpublished). In his second suit, the Colorado Court of Appeals affirmed the dismissal based on *res judicata* of his state suit for declaratory relief seeking restoration of his earned time credits based on the classification. *Chambers v. Colorado Dept. of Corrections,* No. 95CA1248 (Colo. Ct. App. Apr. 18, 1996). Returning to federal court again *pro se,* Mr. Chambers filed the lawsuit underlying our second review here challenging his classification as a sexual offender in violation of due process and equal protection. On cross-motions for summary judgment, the district court held the action was not barred by, *res judicata* because the challenge to the classification itself had not been previously raised. However, the court granted the CDOC's motion for summary judgment on the claims of the violation of Mr. Chambers' equal protection, due process, and *ex post facto* rights. The CDOC did not cross-appeal that conclusion, the district court having rejected each of the attendant constitutional claims.

In his appeal of that judgment, we appointed counsel to address the constitutionality of Colorado's Sex Offender Treatment Program, Colo. Rev. Stat. § 16-11.7- 101 et seq., effective 1992 (the Act), believing that was the operative authority challenged in Mr. Chambers' *pro se* brief. Our focus was sharpened by *Neal v. Shimoda,* 131 F.3d 818 (9th Cir. 1997).

With this direction, appointed counsel contended the Act violated the Ex Post Facto Clause because it, in fact, imposed punishment in the guise of treatment by reducing the amount of earned time credit Mr. Chambers received, thereby lengthening his sentence. Further, the Act violated

due process, counsel argued, because this highly stigmatizing label worked an atypical deprivation of Mr. Chambers' liberty interest. The CDOC responded that even though the action was barred by *res judicata,* the Constitution did not provide a right to any particular prison classification. The CDOC distinguished *Neal v. Shimoda* on the ground the Hawaii Sexual Offender Treatment Program conditioned eligibility for parole on the inmate's being labeled a sex offender and participating in the treatment program. In contrast, the CDOC argued, Mr. Chambers "lost nothing to which he ever had an entitlement."

However, during oral argument, the CDOC told the panel the Act did not even apply to Mr. Chambers' case. Instead, his classification was premised on internal CDOC policy which is not limited to inmates convicted of sex offenses. After further confusion over whether Mr. Chambers was prevented from receiving earned time credits or simply had his earned time credits reduced and which earned time credit statute applied, the panel remanded the case for the district court to conduct an evidentiary hearing aimed at clarifying the factual and legal predicates of the issues. ***Chambers III.***

The joint stipulation of facts and exhibits filed in the district court provides the following clarification. As factual support for the classification, the police report, victim's affidavit, and reference to the 1983 sexual assault in the presentence report filed for Mr. Chambers' present incarceration comprised the evidence upon which the CDOC's SOTP team had relied since 1987. Mr. Chambers was classified an S-2 based on the 1987 Sex Offender Component of the RAMP, A/R 600-1. However, the same regulation and criteria are applied to inmates covered by the ACT, and the treatment programs are consolidated. In 1989, when RAMP created five risk categories, S- I through S-5, incorporated in Regulation 700-19, Mr. Chambers' S-2

classification became S-4.[8] Mr. Chambers has never admitted to or been convicted of any sex offense although, the parties stipulated, "[t]here are convicted sex offenders who do not participate in SOTP and who nevertheless receive the maximum awardable earned time credits."[9] If Mr. Chambers "admitted liability" and complied with SOTP even if he could not participate, "he would receive an additional 3 days of earned time credits each month.'" Mr. Chambers filed a grievance contesting his S-4 classification, but CDOC personnel rejected it in each of the three steps of the grievance procedure. Additionally, the parties stipulated until June 7, 1990, Colo. Rev. Stat. § 17-22.5-302 governed the calculation and award of Mr. Chambers' earned time credits. Presently, Colo. Rev. Stat. § 17-22.5-405 applies."[10]

Thus, though not originally classified under the Act, the terms of Mr. Chambers' treatment including, the

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[8] Administrative Regulation 700-19 at 2, Article IV(A), [Exh. 10], identifies S-4 as "[i]ndividuals whose history indicates sexual assaults or deviance for which they may not have been convicted. These cases often involve plea bargains where the factual basis of the crime involved a sex offense. This category also includes misdemeanor convictions and juvenile convictions for sex offenses." The parties agreed, "On one or more occasions, one or more of his case managers have erroneously listed him as S-5 [individuals with past or current felony sexual offense convictions] although his correct classification is S-4."

[9] CDOC maintains, and Mr. Chambers does not disagree, that participation in an SOTP depends on availability of the program at the particular prison facility as well as size limitations and the time remaining in the inmate's parole eligibility date. Presumably, then, the SOTP may be satisfied simply by the inmate's admission he is a sex offender.

[10] Colo. Rev. Stat. § 17-22.5-405(l) states:

> Earned time, not to exceed ten days for each month of incarceration or parole, may be deducted from the inmate's sentence upon a demonstration to the department by the inmate, which is certified by the inmate's case manager or parole officer, that he has made consistent progress in the following categories: (C) Participation in counseling sessions ....

requirement for his admission to being a sex offender are now merged into those of the Act. Further. though the same factual predicates for classifying him a sex offender have existed since he was first so labeled, only in 1992 were earned time credits taken away as a consequence of the label. Hence, the focus becomes whether what was taken away as a consequence of the label is simply a privilege, as the CDOC maintains, or something of value. Under the former view, the action is a matter of discretion insulated from constitutional scrutiny; under the latter, Mr. Chambers may have a liberty interest in his earned time credits which cannot be arbitrarily taken away without some procedural safeguards. More importantly, because the key to receiving the "privilege" is acceptance of a highly stigmatizing label under the circumstances of this case, we must subject the CDOC's explanation to careful scrutiny.

Nonetheless, the CDOC asks us to view this picture through a highly discretionary lens and cast its determination outside the perimeter of judicial review. It would insulate decisions about classification, placement, and earned time entirely from due process protections.[11] The CDOC asserts the Constitution is not "a micromanager of day-to-day prison activities, and a guarantee of prisoner preferences over those of prison officials." quoting *Handy v. Price,* 996 F.2d 1064, 1068 (10th Cir. 1993), in which an inmate complained about CDOC's treatment of his knee injury and hepatitis. Further. based on *Neal,* the CDOC contends the classification without any coercive consequence does not amount to the "stigma plus" the Court required in *Sandin v. Conner,* 515 U.S. 472, 479 n. 4 (1995), to implicate a liberty interest. It insists Mr. Chambers, even without his participation in the SOTP, will not be held beyond his sentence or denied his statutory right

[11] Each of the CDOC's citations to authority for this proposition is slightly off the mark, however.

to appear before the Parole Board on his parole eligibility date.

We review the grant of summary judgment *de* novo, applying the same standard as did the district court. *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir. 1998). Summary judgment is then appropriate if, after reviewing all of the evidence submitted in the light most favorable to the non-movant, no genuine issue of material fact survives to merit a trial. *UMLIC-Nine Corp. v. Lipan Springs Dev. Corp.*, 168 F.3d 1173, 1176 (10th Cir. 1999); Fed. R. Civ. P. 56(c).

Mr. Chambers contends by reducing the number of earned time credits he receives, his parole eligibility date is not advanced as rapidly as before. The consequence is tantamount to lengthening the sentence he must serve. The SOTP, thus, increases his punishment and violates the Ex Post Facto Clause of the Constitution, he argues.

[T]he constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). To do so, the law must be retrospective, applying to events which occurred before its enactment; and it must disadvantage the individual, by "altering the definition of criminal conduct or increasing the punishment for the crime." *Fultz v. Emhry*, 158 F.3d 1101, 1102 (10th Cir. 1998), quoting *Lynce v. Mathis*, 519 U.S. 4.33 (1997).

Mr. Chambers can show no facts to support his *ex post facto* claim. Application of the SOTP to him has not increased his punishment for he possesses no vested right in a particular parole date or parole hearing eligibility date. In Mr. Chambers' case, the SOTP does not criminalize conduct that was legal before its passage. Further, in rehabilitative matters, prison officials may consider any history established in the inmate's record which it may determine requires

treatment. Thus, because application of the SOTP "did not affect the legal consequences of [his] crime or increase his punishment, "there is no *ex post facto* violation. *Fristoe v. Thompson,* 144 F.3d 627, 630 (10th Cir. 1998). We therefore affirm the district court's granting summary judgment.[12]

"The Due Process Clause Guarantees due process only when a person is to be deprived of life, liberty, or property." *Templeman v. Gunter,* 16 F.3d 367, 369 (10th Cir. 1994). Finding such a violation in the prison setting is particularly daunting. However, although an inmate's rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell,* 418 U.S. 539, 555-56 (1974).

The Supreme Court has recognized a prisoner may be deprived of a liberty interest based on a severe change in the conditions of confinement. "These interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin,* 515 U.S. at 483 (citations omitted). It has also found a liberty interest may be implicated when State laws and prison regulations grant inmates liberty interests to which due process protections apply. *Meachum v. Fano,* 427 U.S. 215, 223-27 (1976). "In the first situation, the liberty interest exists apart from the state; in the second, the liberty interest

[12] We also affirm summarily the grant of summary judgment on the denial of Mr. Chambers' equal protection claim, no factual allegations or supporting authority giving any merit to this argument.

is created by the state." *Kirby v. Siegelman,* 195 F.3d 1285, 1291 (11th Cir. 1999).

Under the circumstances here, although the CDOC has not created a liberty interest in a prisoner's not being classified a sex offender, it has through its administrative policy applied the SOTP to Mr. Chambers in such a way as to permit him to continue to receive the benefit of the maximum amount of earned time credit. That is, after five years of being labeled a sex offender without Mr. Chambers' admitting that status and with his receiving ten days of earned time credits a month, the CDOC has removed the "benefit" it consistently awarded with the label. The removal of that benefit then implicates Mr. Chambers' liberty interest in not being labeled a sex offender. And, it is the label replete with inchoate stigmatization - here based on bare allegations which are vigorously denied and which have never been tested - which requires some procedural scrutiny.[13] The consequences of that label, then, are not a privilege as the CDOC insists, but something of value entitled to procedural due process.

Neal v. Shimoda, 131 F.3d at 818, provides some parallels for our analysis. The Hawaii SOTP challenged in that case is virtually identical to the SOTP here except that eligibility for parole is conditioned on participation in the program. Inmate Neal was indicted for robbery. kidnapping, three counts of sexual assault in the first degree, as well as other charges. He subsequently entered into a plea agreement in which the sex offense charges were dismissed. Hawaii

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[13] We would note the Colorado legislature, like many other state legislatures, is considering enacting a "Megan's law," requiring sex offenders to register with law enforcement officials. The CDOC has already stated that for a period of time, Mr. Chambers was incorrectly labeled an S-5, a convicted sex offender. Given the emotional climate generated by the issue, the possibilities for mischaracterization and mischief are always present when such a label is affixed.

corrections officials reviewed the indictment and presentence investigation report and classified Neal as a sex offender. Neal challenged the SOTP under 42 U.S.C. § 1983 on *ex post facto* and due process grounds.[14]

The Ninth Circuit concluded there was no *ex post facto* violation because the "Supreme Court has held that such mandatory treatment programs following an inmate's classification as a sex offender based on conduct which occurred prior to the program's beginning do not violate the Ex Post Facto Clause." *Id.* at 827, relying on *Kansas v. Hendricks,* 521 U.S. 346 (1997). However, it held the stigmatizing consequences of the sex offender label coupled with the mandatory treatment program as preconditions for parole eligibility "create the kind of deprivations of liberty that require procedural protections." 131 F.3d at 831. The holding relied on *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (Fourteenth Amendment's Due Process Clause entitles a prisoner to certain procedural protections before his involuntary transfer to a state mental hospital); and *Sandin.* 515 U.S. at 472 (inmate's discipline in segregated confinement does not present the type of atypical, significant deprivation in which a state might create a liberty interest).[15]

To the Ninth Circuit, "the substantive predicate is the labeling of the targeted inmate as a sex offender. Once that is done, it is *mandatory* that the labeled inmate successfully complete the specified treatment program in order to become

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[14] The second plaintiff in that action was convicted of kidnapping and attempted rape, a status which led the Ninth Circuit to find he had "received all of the process to which he was due." *Neal v. Shimoda,* 131 F.3d 818, 831 (9th Cir. 1997)

[15] The Ninth Circuit rejected the state's suggestion *Kentucky Dep't of Corrections v. Thompson,* 490 U.S. 454 (1989) (prison visitation regulations do not establish a liberty interest), supplanted *Vitek v.* Jones, 445 U.S. 480 (1980), and believed its analysis was supportable under both cases. 131 F. 3d at 829.

eligible for parole." 131 F.3d at 830 (italics in original). In *Kirby v. Siegelman,* 195 F.3d at 1291, the Eleventh Circuit also concluded an inmate who has not been convicted of a sex offense has "a liberty interest in not being branded a sex offender." Under the circumstances here, too, it is the mandatory assignment of the label which forms the substantive predicate. According to the CDOC's stipulations, it has no discretion in applying the label; however, it has whatever discretion it chooses in deciding what conduct satisfies the consequences of the label.

The CDOC thus provided Mr. Chambers a liberty interest in the consequences of the *mandatory* label which it then arbitrarily removed without affording him any "opportunity to a hearing to challenge the label. We think those consequences are a benefit which cannot be taken away without some process.[16]

We therefore reverse the district court's granting summary judgment and order entry of summary judgment for Mr. Chambers on his claim for injunctive relief, enjoining the CDOC from withholding earned time credit because he refuses to admit to being a sex offender. Because the state of the law was not established when these actions were taken, the prison officials named in this lawsuit are entitled to qualified immunity. Thus, Mr. Chambers' claim for damages cannot be sustained. *Neal v. Shimoda,* 131 F.3d at 832.

AFFIRMED, in part and REVERSED, in part.

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attach to earned time[16] This conclusion is not contrary to *Templeman v. Gunter, 16* F.3d 367 (10th Cir. 1994). In that case, CDOC officials had discretion to place the inmate in administrative segregation based on a history of escapes, extreme violence, and other conduct. "Once there, Templeman did not meet the criteria for receiving earned time." Id. at 370. The case does not stand for the broad proposition, as the CDOC offers, that a liberty interest can never e credits.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Zita L. Weinshienk

Civil Action No. 95-Z-2028

JOHN H. CHAMBERS,

Plaintiff,

v.

COLORADO DEPARTMENT OF CORRECTIONS and MARGARET HEIL, Individually, and in her Official Capacity,

Defendants.

ORDER

The matter before the Court is the Recommendation Of United States Magistrate Judge issued by Magistrate Judge Michael J. Watanabe on October 7, 1999. On January 6, 1999, the United States Court of Appeals for the Tenth Circuit issued an order of remand asking that the district court conduct an evidentiary hearing and make factual findings to aid in the resolution of Mr. Chambers' challenge to his Sex Offender Treatment Program (SOTP) classification. Pursuant to an Order of Reference issued by his Court on March 19, 1999, the matter was referred to Magistrate Judge Watanabe to conduct the ordered evidentiary hearing and make a recommendation as to factual findings. Prior to holding this hearing, the parties jointly submitted stipulated facts and exhibits which they

stated composed all of the evidence which they wished to submit to the Court for its findings.

In his Recommendation, the Magistrate Judge recommends that the stipulations and exhibits be admitted into evidence and the case be returned to the Court of Appeals for its final ruling. Neither party has objected to the Recommendation. After careful consideration thereof, the Court finds the recommendation to be thorough and thoughtful, and hereby accepts and adopts the Magistrate Judge's findings and Recommendation.

Accordingly, it is ORDERED that the Recommendation Of United States Magistrate Judge is hereby accepted and adopted.

It is FURTHER ORDERED that the parties Joint Stipulation Of Facts And Exhibits are accepted, and the attached exhibits are admitted into evidence.

It is FURTHER ORDERED that the case be returned to the United States Court of Appeals for the Tenth Circuit for its final ruling.

Dated at Denver, Colorado, this 23rd day of November, 1999.

BY THE COURT:

\s\

ZITA L. WEINSHIENK, Senior Judge
United States District Court

APPENDIX D

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 95-Z-2028

JOHN H. CHAMBERS,

Plaintiff,

v.

COLORADO DEPARTMENT OF CORRECTIONS and MARGARET HEIL, Individually and in her Official Capacity,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael J. Watanabe, United States Magistrate Judge

This matter is before the Court on an order of remand dated January 6, 1999. In its order of remand, the United States Court of Appeals for the Tenth Circuit made the following findings:

> In 1985, Mr. Chambers was convicted of aggravated robbery and attempted theft and, because of prior convictions, sentenced as a habitual criminal to thirty-nine years' imprisonment. In 1992, Phyllis Bachicha, a

> newly assigned case manager, reviewed Mr. Chambers' CDOC file and discovered a police report indicating Mr. Chambers had been charged with first degree sexual assault in 1983. The case was dismissed without prejudice when the victim decided not to proceed. Based on the report, Ms. Bachicha recommended Mr. Chambers for participation in the SOTP Under the CDOC Risk Assessment Management Program, Sex Offender Component, Mr. Chambers was judged eligible to participate, and the Sex Offenders Treatment staff classified him S4 on the Sexual Violence Scale: "[i]ndividuals whose history indicates sexual assaults or deviance for which they may not have been convicted." However, CDOC did not accept Mr. Chambers in SOT? because he refused to admit to sexually assaultive behavior, a precondition to participation. As a consequence, Ms. Bachicha reduced the amount of earned time Mr. Chambers received from ten to seven days a month. [footnotes omitted]

After making these findings, the Court of Appeals remanded the case to the district court to make factual findings, stating:

> ... [W]e are unable to determine from this record whether the legal basis of Mr. Chambers' classification is the internal CDOC policy which may derive from the Act or the prior Sexual Offender Sentencing statute, or is entirely of the CDOC's creation. We also lack any evidentiary basis of that classification to support Ms. Heil's statements. Consequently,

> without these tracks laid, we are lost to address the merits of this appeal. Indeed, before embarking on the questions presented, prudential concerns should always constrain our 'reach[ing] constitutional questions in advance of the necessity of deciding them." [citations omitted]

We therefore remand this case to the district court to conduct an evidentiary hearing and make factual findings to assist in our resolution of Mr. Chambers' challenge to his SOTP classification.

The parties have submitted joint stipulations of evidentiary facts and exhibits. The parties have also stated that these stipulations and exhibits comprise all of the evidence which they wish to submit to the Court for its findings on remand. The parties do not request any further hearing. Accordingly, I recommend that those stipulations be accepted and that the exhibits attached to those stipulations be admitted into evidence.

THEREFORE IT IS RECOMMENDED that the Stipulations and Exhibits be admitted into evidence and that the case be returned to the Court of Appeals for its final ruling.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the parties have ten (10) days after service to serve and file written, specific objections to the above recommendations with the District Judge assigned to the case. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written specific objections WILL PRECLUDE the

party from a *de* novo determination by the District Judge, *United States v. Raddatz,* 447 U.S. 667, 676-83 (1980), and also WILL PRECLUDE appellate review of both factual and legal questions, *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated: October 7th,
1999
Denver, Colorado

APPENDIX E

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOHN H. CHAMBERS, Plaintiff-Appellant, COLORADO DEPARTMENT OF CORRECTIONS and MARGARET HEIL, in her individual and official capacity, Defendants-Appellees.	No. 97-1023 (D.C. No. 95-Z-2028) (District of Colorado)

ORDER AND JUDGMENT*

Before **PORFILIO, HOLLOWAY,** and **HENRY,** Circuit Judges.

In this appeal, we revisit the Colorado Department of Corrections' (CDOC) classification of inmate John H. Chambers as a sex offender eligible to participate in the Sexual Offender Treatment Program (SOTP). In a prior appeal to this court, we rejected Mr. Chambers' pro se challenge to the CDOC's reduction of the amount of earned time credit he received because he refused to participate in the SOTP. In an unpublished order, we concluded because there is no constitutional right to good or earned time credit, Mr. Chambers' due process and equal protection claims posited on this non-protected interest must also fail. *Chambers v. Bachicha,* 39 F.3d 1191 (10th Cir. 1994) (unpublished). In this case, Mr. Chambers, again proceeding pro se, challenged the classification itself, asserting under the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

factual circumstances of his case, the CDOC cannot classify him as an inmate in need of SOTP and then punish him for refusing to participate by reducing the number of earned time credits he may receive. To chart our way, the court ordered the appointment of counsel and defined his route to address the constitutionality of the Standardized Treatment Program for Sex Offenders, Colo. Rev. Stat. §§ 16-11.7-101- 16-11.7-107 (1992) (the Act), as applied to Mr. Chambers. However, because the CDOC's response has overlaid an entirely different direction in our analysis, we must remand the case for an evidentiary hearing.

In 1985, Chambers was convicted of aggravated robbery and attempted theft and, because of prior convictions, sentenced as a habitual criminal to thirty-nine years' imprisonment. In 1992, Phyllis Bachicha, a newly assigned case manager, reviewed Mr. Chambers' CDOC file and discovered a police report indicating Mr. Chambers had been charged with first degree sexual assault in 1983. The case was dismissed without prejudice when the victim decided not to proceed.[1] Based on the report, Ms. Bachicha recommended Mr. Chambers for participation in the SOTP. Under the CDOC Risk Assessment Management Program Sex Offender Component, Mr. Chambers was judged eligible[2] to participate, and the Sex Offenders Treatment staff classified him S4 on the Sexual Violence Scale:

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[1] The Police Report indicated Mr. Chambers and the victim had been living together; the victim stated she had previously had sexual intercourse with Mr. Chambers; and the two had been drinking together on the night of the alleged assault; and the victim's description of the manner of the assault could not be verified by the officer's inspection of the room. The physician who later treated the victim noted multiple fissures, anal tears, and bruises on the victim. Mr. Chambers insisted the sexual encounter was consensual.

[2] The record indicates that some individuals recommended for SOTP are found ineligible to participate but does not explain the basis for ineligibility in those instances.

"[i)ndividuals whose history indicates sexual assaults or deviance for which they may not have been convicted." However, CDOC did not accept Mr. Chambers in SOTP because he refused to admit to sexually assaultive behavior, a precondition to participation. As a consequence, Ms. Bachicha reduced the amount of earned time Mr. Chambers received from ten to seven days a month.

The action triggered three lawsuits. *See Chambers v. Bachicha, 92-F-2238 (*D. Colo. June *7, 1993), affd*, 39 F.3d 1191 (10th Cir. 1994*)* (unpublished) ***(Chambers 1)***; *Chambers v. Colorado Dept. of Corrections*, 95 CV 8 *(*D.C., Lincoln County, June 13, 1995*), qffd*, No. 95 CA 1248 (Colo. Ct. App. Apr. 18, 1996) ***(Chambers II)***. In the first federal action, ***Chambers I***, Mr. Chambers, appearing pro se, alleged the classification made him ineligible to receive maximum earned time credits in violation of his rights to due process and equal protection and violated his privilege against self-incrimination. This court affirmed the dismissal upon the conclusion Mr. Chambers failed to assert a constitutional claim, the award of earned time credits being firmly vested within the CDOC's discretionary domain. In ***Chambers II,*** Mr. Chambers sought declaratory relief in state court challenging the CDOC's classifying him as a sexual offender but seeking the same goal, restoration of his maximum earned time credits. The Colorado Court of Appeals affirmed the state district court's dismissal based on res judicata.

In the present lawsuit, Mr. Chambers, again proceeding pro se, alleged he was improperly classified as a sexual offender, causing a violation of his equal protection and due process rights. Adopting the Magistrate Judge's Recommendation, the district court agreed res judicata did not bar Mr. Chambers' claim, stating "[i)t is clear from the record that his assertion that he should not be classified as an inmate in need of the SOTP has not been raised in previous

lawsuits." Proceeding to address the merits, the district court rejected his equal protection and due process assertions, a newly raised gender discrimination claim, and an ex post facto argument. Mr. Chambers filed this appeal. CDOC did not appeal the court's refusal to dismiss the action based on res judicata. CDOC continues to argue res judicata bars the present action and appeal although it did not cross appeal the district court's contrary finding. Given the present state of the record but mindful CDOC may "defend its judgment on any ground properly raised below whether or not that ground was relied upon," *Washington v. Confederated Bands and Tribes,* 439 U.S. 463, 476 n.20 (1979), we would await the trial court's clarification of the issue on the merits before we decide whether this action is barred by res judicata.

As noted, we appointed counsel to represent Mr. Chambers in this appeal to address the constitutionality of the Act's SOTP as applied to Mr. Chambers. Because the tangible consequence of Mr. Chambers' refusal to be classified as a sexual offender was the loss of three days of earned time credit per month, a deduction which apparently alters the date he becomes eligible for parole, our analysis remained focused on whether the classification triggered a protected liberty interest. Consequently, both parties filed supplemental briefs addressing whether Mr. Chambers' classification as a sexual offender violated the ex post facto clause and involved a protected liberty interest requiring some degree of due process before he can be classified as a sexual offender without a prior conviction for such an offense. The questions were spawned by a recent Ninth Circuit decision, *Neal v. Shimoda,* 131 F.3d 818, 828 (9th Cir. 1997), which held that a similar Hawaii statute conditioning parole on an inmate's signing a statement acknowledging he is a sex offender even if he has not been convicted of the offense imposed a significant stigmatizing consequence on the inmate. Hence, the label created "the

kind of deprivations of liberty that require procedural protections." *Id* at 829.

Poised to perform a similar analysis, we were told by appellee's counsel during oral argument the Act does not even apply. Instead, counsel asserted Mr. Chambers' disposition was triggered by internal CDOC policy. However, when asked what legal basis supported the CDOC's action, its counsel asserted CDOC was relying on two earned time credit statutes, one enacted in 1974, Colo. Rev. Stat. § 17-22.5-301, and a later one, Colo. Rev. Stat. § 17-22.5-406, enacted in 1990. Pressed, CDOC's counsel elected the latter earned time provision which permits a discretionary award of up to ten days per month. Based on § 17-22.5-406, CDOC counsel told us Ms. Bachicha merely reduced Mr. Chambers' earned time deductions from ten days to seven days, which, counsel then characterized, resulted simply in not accelerating the date of Mr. Chambers' parole eligibility as quickly as it had been advanced, but did not otherwise affect his eligibility for parole. Thus, CDOC counsel urged we look to CDOC policy to validate the classification and § 17-22.5-406 to define the consequences.

To support the classification factually, the CDOC filed a *Martinez* Report in 1995 and attached the affidavit of Margaret Heil, the administrator of the CDOC's SOTP. The *Martinez* Report summarily listed the criteria for treatment for all S-3's, S-4's, and S-5's in the SOTP and referenced portions of Ms. Heil's affidavit to respond to the due process and equal protection arguments. Ms. Heil attested to the factual basis of Mr. Chamber's classification, the police report, and the victim's affidavit stating she would not prosecute. [3] Ms. Heil averred CDOC "first identified [Mr.

[3] The victim stated, "If you let him back on the streets there will be another victim." At oral argument, counsel stated Mr. Chambers, then unrepresented, did not file a counter-affidavit.

Chambers] within the DOC as having indications of sex offense behavior in December 29, 1987," and stated he has always been classified S-4 although he stated he was classified S-5 , "an individual with past or current felony sexual offense convictions." The record before us does not contain any evidentiary testing of the facts asserted.[4]

Thus, we are unable to determine from this record whether the legal basis of Mr. Chambers' classification is the internal CDOC policy which may derive from the Act or the prior Sexual Offender Sentencing statute,[5] or is entirely of the CDOC's creation. We also lack any evidentiary basis of that classification to support Ms. Heil's statements. Consequently, without these tracks laid, we are lost to address the merits of this appeal. Indeed, before embarking on the questions presented, prudential concerns should always constrain our "reach[ing].constitutional questions in advance of the necessity of deciding them. " *Three Affiliated Tribes v. Wold Eng'l.* 467 U. S. 138, 157 (1984); *see also Spector Motor Serv., Inc. v. McLaughlin,* 323 U.S. 10 1, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality ... unless such adjudication is unavoidable.").

We therefore remand this case to the district court to conduct an evidentiary hearing and make factual findings to

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[4] For example, the record contains a letter from Sandi Patrick-Hendricks, MSW Mental Health, in response to Mr. Chambers' request for information on SOTP. She prefaced the information provided by stating: Per our discussion yesterday, this information should inform you of the the [sic) recommendations for treatment and criteria for SOTP. This material *is not taken from an operational policy, but is taken from the Sex Offender Treatment Program Plan.* Exhibit D (italics added).

[5] Under that statute, the definition of a sexual offender is confined to persons convicted of a sexual offense. Colo. Rev. Stat. § 16-13-202(4).

assist in our resolution of Chambers' challenge to his SOTP classification. Although the CDOC represents it may classify each prisoner any way it chooses, we predicate our remand with the caution the sexual offender classification on its face implicates stigmatization concerns unlike, for example, classification of a prisoner in need of additional literacy training or classification recommending greater supervision based on contemporary observation of a prisoner's aggressive behavior. We trust exploration of these factual questions will elucidate the legal basis for Mr. Chambers' claims. Development of that record will direct our further review.

We thus REVERSE and REMAND.
ENTERED FOR THE COURT

John C. Porfilio
Circuit Judge

APPENDIX F

THE UNITED STATES DISTRICT COURT
FOR THE-DISTRICT OF COLORADO

Judge Zita L. Weinshienk

Civil Action No. 95-Z-2028

JOHN H. CHAMBERS,
Plaintiff,

v.

COLORADO DEPARTMENT OF CORRECTIONS and MARGARET HEIL, Individually, and in her Official Capacity,

Defendants.

ORDER AND JUDGMENT

Plaintiff, an inmate at the Limon Correctional Facility (LCF), has filed this pro se Civil Rights Complaint pursuant to 42 U.S.C. § 1983, alleging that his civil rights have been violated. He seeks injunctive relief and monetary damages. The matter now before the Court is defendants' Motion To Dismiss And Motion For Summary Judgment.

In 1987 the Colorado Department of Corrections (DOC) classified plaintiff as a "sex offender' based, in part, on an arrest for sexual assault prior to his conviction and current sentence. Thereafter, in 1992, plaintiff was recommended for the Sex Offender Treatment Program

(SOTP). After DOC evaluation, plaintiff was rejected for the program because he refused to admit any sexual wrongdoing.

In late 1992, plaintiff filed Civil Action No. 92-F-2238, alleging numerous problems with the SOTP. Former Chief Judge Sherman Finesilver dismissed this case, and the United States Court of Appeals for the Tenth Circuit affirmed this dismissal on October 28, 1994. In March of 1995, plaintiff filed a second civil lawsuit in Lincoln County District Court, again alleging problems with the SOTP. On June 13, 1995, this case was dismissed. The Colorado Court of Appeals subsequently affirmed this dismissal.

Plaintiff then filed the current action on August 9, 1995. He alleges that his classification as a sex offender by the DOC violates the Equal Protection Clause and the Due Process Clause of the United States Constitution. Defendants have filed a "Motion To Dismiss And Motion For Summary Judgment," asserting, in part, that plaintiffs claims are barred by the doctrine of res judicata.

Pursuant to D.C.COLO.LR 72.4, this matter was referred to Magistrate Judge Richard M. Borchers, who filed a Recommendation Of United States Magistrate Judge on July 1, 1996, in which he recommended that plaintiffs cause of action be dismissed. Plaintiff filed timely objections.

As required by 28 U.S.C. § 636(b), the Court has reviewed de novo all portions of the Magistrate Judge's Recommendation, plaintiffs objections, and the applicable case law, and concludes that the Magistrate Judge's Recommendation is well-reasoned and correct.

As a preliminary matter, the Court agrees with the Magistrate Judge that the doctrine of res judicata does not apply to plaintiffs claims. It is clear from the record that his

assertion that he should not be classified as an inmate in need of the SOTP has not been raised in previous lawsuits.

However, the Court is satisfied that plaintiffs claims must fail on the merits. Plaintiff has made a conclusory allegation that, in being classified as an inmate in need of the SOTP, he is being treated differently from other inmates. The problem with this claim is that plaintiff fails to allege that defendants treated him differently because of any suspect classification. In such a situation, plaintiff must show that "the distinction between himself and other inmates was not reasonably related to some legitimate penological purpose." *Templeman v. Gunter*, 16 F.3d 367, 371 (10th Cir. 1994). Classification decisions are entirely discretionary, and are based on numerous criteria. *Id.* "It is clearly baseless to claim that there are other inmates who are similar in every relevant respect." *Id.*

Plaintiff has been convicted of at least six felonies, and has been sentenced as a habitual criminal. In addition, although not convicted, plaintiff has been arrested for sexual assault. *See* Affidavit of Margaret Heil, (attached to defendants' motion to dismiss). While the victim continued to insist that she was raped and sodomized by defendant, she decided against suffering through the trauma of trial, and dismissed the case. However, before doing so the victim documented that she felt there would be another victim if he was released. *Id.* Plaintiff has been classified by the DOC as an "S-4" since 1987. *Id.* Inmates classified as a "S-4" are those with a documented history of sex offense behavior, without a sex offense conviction. There is clearly a rational basis for classifying plaintiff as a "S-4," and such a classification is not a violation of plaintiffs constitutional rights.

Plaintiff also asserts that his classification as a "S-4" is in retaliation for his current and past litigation. In such a

case, the plaintiff must show that retaliation is the actual motivating factor behind the defendants' actions. *Smith v. Maschner*, 899 F.2d 940, 949 (10th Cir. 1990). Defendant has presented nothing that shows retaliation to be the actual motivating factor behind defendants' decision recommend him for SOTP. As previously noted, the evidence shows that his classification as a "S-4" is reasonable.

Plaintiff has admitted that his claim for racial discrimination is unfounded at this time. He has no objection to the Magistrate Judge's recommendation that this claim be dismissed.

Plaintiff has raised several additional issues in his "Objection To The Recommendation Of The United States Magistrate." As a preliminary matter, plaintiff objects to the Magistrate Judge issuing a recommendation on issues other than defendants' motion for summary judgment. Specifically, plaintiff asserts that such a recommendation was improper in light of an Order of Judge Daniel B. Sparr, dated January 26, 1996, holding this case in abeyance pending further order of the court. The problem with this objection is that, in referring this case to the Magistrate Judge for the purposes of making a recommendation "on matters contained therein," this Court lifted the stay imposed by Judge Sparr.

Plaintiff also objects to the dismissal of his case without giving him the opportunity for complete discovery. Specifically, plaintiff asserts that full discovery would show other similar inmates who have not been classified as sex offenders. This objection has little merit in light of the well-established case law discussing the inherent differences among inmates, and how these difference make each inmate classification decision unique. *See Bell v. Wolfish*, 441 U.S. 520 (1979). Regardless of the number of inmates plaintiff

finds who have not been classified as sex offenders, the DOC's discretionary actions toward plaintiff are reasonable and not a violation of his constitutional rights. *See Templeman v. Gunter*, 16 F.3d 367, 371 (10th Cir. 1994).

In his "Amended / Supplemental Civil Rights Complaint Pursuant to 42 U.S.C. § 1983," plaintiff raises a claim for gender discrimination. Although the Magistrate Judge did not specifically address the merits of this claim, he did recommend that the amended complaint be stricken. Plaintiff now objects to the Magistrate Judge's failure to discuss his claim for gender discrimination. In particular, plaintiff asserts that female inmates with similar criminal histories as plaintiff are not routinely identified as candidates for the SOTP. As noted above, no two inmates are identical, and therefore there is no constitutional requirement that all inmates be treated alike. *Id.*

Finally, plaintiff has raised an assertion that requiring him to participate in the SOTP is a violation of the Ex Post Fact Clause of the Constitution. For the reasons stated above, plaintiffs "ex post facto claim" also is without merit.

Accordingly, it is ORDERED that defendant's Motion To Dismiss And Motion For Summary Judgment is granted.

It is FURTHER ORDERED that plaintiffs Complaint, Amended Complaint, and cause of action are dismissed with prejudice.

It is FURTHER ORDERED that all other motions are moot.

DATED at Denver, Colorado, this 22nd day of November, 1996.

BY THE COURT:

\s\

ZITA WEINSHIENK, Judge
United States District Court

APPENDIX G

COLORADO COURT OF APPEALS

April 18, 1996

No. 95CA1248, Division V

NOT SELECTED FOR PUBLICATION

John H. Chambers,

Plaintiff-Appellant,

Colorado Department of Corrections, Phyllis Bachicha, Case Manager, Limon Correctional Facility, and Sandi Patrick-Hendricks, Master Social Worker, Limon Correctional Facility,

Defendants-Appellees.

Appeal from the District Court of Lincoln County
Honorable Norman L. Arends, Judge
No. 95CV8

JUDGMENT AFFIRMED
Opinion by JUDGE TAUBMAN
Rothenberg and Casebolt, JJ., concur

John H. Chambers, *Pro Se*

Gale A. Norton, Attorney General, Stephen K. ErkenBrack, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Paul S. Sanzo, First Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

CHAMBERS II

Plaintiff, John H. Chambers, appeals the dismissal of his action seeking a declaratory judgment. We affirm.

Plaintiff is a prisoner currently serving a 39-year sentence in the custody of the Department of Corrections (the Department). None of the convictions underlying plaintiff's sentence is for a sexual offense and plaintiff has never been convicted of a sexual offense.

In 1992, plaintiff filed an action in federal district court claiming that, by classifying him as a sex offender ineligible for maximum earned time credits unless he participated in a treatment program which required him to admit to a sexual assault for which he had been charged but not convicted, defendants violated his rights to due process and equal protection as well as his privilege against self-incrimination. Plaintiff named as defendants the two individuals named as defendants in the present action (among others). Although the Department was not named as a party in the federal action, the defendants were sued in their official capacity as employees of the Department.

Plaintiff's federal suit was dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. The federal district court reasoned that plaintiff's due process claim was without merit because, under Colorado law, the award of earned time credits is purely discretionary with the Department. The court also rejected plaintiff's equal protection argument on the merits, explaining that, under well-established federal precedent, plaintiff's classification as a sexual offender was an adequate justification for disparate treatment. The federal district court also concluded that plaintiff's Fifth Amendment self-incrimination claim was baseless because Department regulations established confidentiality for admissions made in sex offender treatment. The district court's order of dismissal was upheld on appeal in a ruling on the merits by

the United States Court of Appeals for the Tenth Circuit. *Chambers v. Bachicha*, No. 93-1233, (10th Cir. Oct. 28, 1994).

In 1995, plaintiff commenced this declaratory judgment action in state district court. Plaintiff's action sought to challenge the Department's decision classifying him as a sexual offender. Plaintiff alleged that the Department's decision classifying him as a sexual offender violated his rights to equal protection and due process by depriving him of maximum earned time credits and thereby extending his parole eligibility date. Plaintiff also alleged that the misclassification obligated him to pay a post-release surcharge and submit to post-release sex offender treatment and monitoring.

Defendants moved to dismiss, arguing that plaintiff was barred from relitigating the claims he had previously raised in federal court. The district court granted defendants' motion, ruling that plaintiff could not pursue a second litigation of issues disposed of in the federal action or raise related issues which should have been pursued in that case. This appeal followed.

We analyze plaintiff's claim applying well-established principles of claim preclusion:

> The doctrine of res judicata provides that a final judgment on the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all later suits on points or matters determined in the former suit. It bars relitigation not only of all issues actually decided, but of all issues that might have been decided.

> For this doctrine to apply to a Judgment of dismissal, there must have been a final judgment on the merits.

Batterman v. Wells Fargo Ag. Credit Corp., 802 P.2d 1112, 1118 (Colo. App. 1990) (citations omitted). In his petition plaintiff asserted that his misclassification as a sexual offender would subject him to a post-release sex offender surcharge and post-release treatment. However, on appeal, plaintiff has abandoned those contentions, apparently recognizing the inapplicability of the relevant statutory sections upon which he originally relied. *See* § 16-11.7-102, C.R.S. (1995 Cum. Supp.) (statutory definition of "sex offender" subject to post-release treatment includes only those *convicted* of enumerated sexual crimes); § 18-21-101, C.R.S. (1995 Cum. Supp.) (persons *convicted* of sexual offenses are obligated to pay a sexual offender surcharge). Therefore, the only remaining alleged injury which could be remedied in this action is plaintiff's ineligibility for the maximum amount of earned time credits: the same alleged injury for which plaintiff sought redress in the federal suit.

Although plaintiff has reframed his claim as a challenge to his classification as a sexual offender by the Department, "the 'same cause of action' requirement is bounded by the injury for which relief is demanded, not by the legal theory on which the person asserting the claim relies." *Shaoul v. Goodyear Tire & Rubber, Inc.*, 815 P.2d 953, 954 (Colo. App. 1990). Whether phrased as a challenge to the deprivation of earned time credits (as in the federal suit) or as a challenge to the classification procedures resulting in that deprivation (as here), plaintiff's due process, equal protection, and Fifth Amendment *self-incrimination arguments* seek the same goal: an award of the maximum amount of earned time credits without requiring him to participate in a sexual offender treatment program which

demands, as a condition of eligibility, that he admit to being a sexual offender.

Further, in our view, even though plaintiff's federal lawsuit challenged a practice of defendants and his state lawsuit challenged a January 14, 1993, mental health memorandum issued by defendants, as noted above, the gravamen of both lawsuits is the same. Plaintiff has sought relief for the same injury in both federal and state court. Accordingly, *res judicata* bars plaintiff's relitigation.

We are not persuaded by plaintiff's two remaining contentions. First, the federal adjudication was, by its own terms, an adjudication on the merits and not, as plaintiff maintains, a dismissal "without prejudice." Second, plaintiff's allegation that he is being subjected to involuntary psychiatric treatment is a mere restatement of his claim that, in order to obtain the discretionary benefit of earned time credits, he must submit to the sex offender treatment program. Judgment of dismissal affirmed.

JUDGE ROTHENBERG and JUDGE CASEBOLT concur.

APPENDIX H

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOHN H. CHAMBERS, Plaintiff-Appellant, v. PHYLLIS BACHICHA, individually and in her official capacity, MARK E. MCKINNA, individually and in his official capacity, BEN GRIEGO, individually and in his official capacity, SANDY HENDRICKS, individually and in her official capacity, GLORIA GREEN, individually and in her official capacity, and JAMES J. MOORE, individually and in his official capacity, Defendants-Appellees.	)	No. 93-1233 (D.C. No. 92-F-2238) (D. Colo.)

ORDER AND JUDGMENT*

Before MOORE, SETH, and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the Court's General Order filed November 29, 1993. 151 F.R.D. 470.

not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

CHAMBERS I

John H. Chambers, a prisoner at the Limon Correctional Facility of the Colorado Department of Corrections (DOC), brought this action under 42 U.S.C. § 1983 alleging the violation of certain constitutional rights. Mr. Chambers claims that DOC officials acted to deny his Fifth Amendment right against self-incrimination as well as his right to due process and equal protection under the law. This he asserts took place when they reduced the amount of earned time for which he would otherwise be eligible from ten days per month to seven days because of his refusal to admit he was a sexual offender. This admission was required to participate in the Sexual Offender Treatment Program (SOTP) to earn good time that Appellant was referred to by Appellee Phyllis Bachicha, a case manager.

The district court, upon the recommendation of the magistrate judge, granted Appellees' motion to dismiss apparently under Fed. R. Civ. P. 12(b)(6). The court concluded that Appellant had no constitutional right to future good time or earned time credit opportunities, and that Appellant's Fifth Amendment claim must fail because of the confidentiality of prison records.

On appeal, Mr. Chambers contends that the district court erred in its dismissal of his complaint. His initial complaint was filed pro se; he has since been appointed an attorney who joins him on appeal. We review a dismissal under Rule 12(b)(6) de novo confining our review to allegations in the complaint and accepting the facts pleaded as true. *Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1566 (10th Cir.). In reviewing the dismissal of a pro se complaint

we view all factual allegations in the light most favorable to the plaintiff. *Hall v. Bellmon*, 935 F.2d 1106, 1109-10 (10th Cir.). A constitutional claim under § 1983 "should not be dismissed unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *Lucero v. Gunter*, 17 F.3d 1347, 1349 (10th Cir.) (quoting *Dunn v. White*, 880 F.2d 1188, 1190 (10th Cir.).

Appellant was convicted in 1985 of aggravated robbery, attempted theft, and habitual criminal activity. He was sentenced to a thirty-nine year term of imprisonment. In November 1983, he had been charged with first degree sexual assault. One month later the charges were dismissed without prejudice.

Appellee Phyllis Bachicha conducted a review of Appellant's inmate file and made a determination that he was earning good time deductions to which he was not entitled because he had not... participated in sex offender treatment. Appeliant was then asked to fill out a questionnaire upon which a determination could be made as to whether he was a candidate for treatment in SOTP. After review of Appellant's responses, the sex offender treatment team announced that Appellant was not a candidate for treatment because he would not admit to the dismissed assault charge of 1983.

Colorado law provides that prisoners incarcerated in that state may receive ten days of earned time per month under certain conditions. *See* Colo. Rev. Stat. § 17-22.5-405 (1994). Appellee Bachicha determined that because Appellant would not admit to the sexual assault charges and thus could not participate in sex offender therapy, he was not entitled to receive all ten days per month as he had done before. It is this decision that forms the basis of Mr. Chambers' complaint.

At the outset, we must determine whether Appellant has stated a constitutionally based claim cognizable under § 1983. Appellant contends that the denial of future earned time credits, under the circumstances of this case, violates his Fourteenth Amendment right to equal protection of the law in that other prisoners receive maximum earned time credit (ten days) without participation in the program. In addition, Appellant contends that his due process rights were violated in that he was not afforded a fair procedure prior to the summary removal of his opportunity to receive earned time credits.

We limit our analysis of these issues to whether Appellant has asserted an interest to which he has a legitimate constitutional claim. "To state a claim, under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States... ." *West v. Atkins*, 487 U.S. 42, 48. Section 1983 is not a source of substantive rights, but provides a method to vindicate federal rights conferred elsewhere. *Albright v. Oliver*, _ U.S. _ , 114 S. Ct. 807, 811.Consequently, Appellant must identify the infringement of a constitutional right. *Id.* The interest that underlies Appellant's equal protection and due process claims is essentially the award of earned time credits. It is established that generally there is no constitutional right to good time or earned time credit. *Wolff v. McDonnell*, 418 U.S. 539, 557. However, a protected liberty interest can arise in earned time where a state statute does not afford prison officials discretion in the awarding of such time. *Olim v. Wakinekona*, 461 U.S. 238, 249; *Williamson v. Jordan*, 797 P.2d 744, 747-48 (Colo.). The reasoning behind this is that the denial of mandatory earned time credits would deprive a prisoner of a liberty interest because the credits would move forward his mandatory release date. *Id.* Consequently, we turn to the provisions of the Colorado statute at issue to ascertain whether prison officials are vested with discretion regarding the award of earned time.

Colorado Revised Statutes § 17-22.5-405 provides that "[e]arned time, not to exceed ten days for each month of incarceration or parole, *may* be deducted from the inmate's sentence. ... " (Emphasis added.) We conclude that use of the term "may" provides a discretionary basis regarding an award of earned time. Because there is no substantive limitation on official discretion, there is no basis upon which this statute may be interpreted to create an entitlement or liberty interest for purposes of the Due Process Clause. *See Olim v. Wakinekona*, 461 U.S. 238 (no liberty interest present where state officials retain discretion regarding prisoner location). Similarly, since we determine that there is no constitutionally protected right to Appellant's earned time credits, his equal protection claim must additionally fail because absent deprivation of a constitutionally protected right Appellant presents no cognizable claim under § 1983. *Atkins*, 487 U.S. at 48.

We turn next to Mr. Chambers' contention that the Fifth Amendment's protections against self-incrimination are triggered by the requirement that Appellant admit to the sexual offense in order to participate in SOTP. The Fifth Amendment provides in relevant part that no person "shall be compelled in any criminal case to be a witness against himself." The magistrate judge found that because DOC Administrative Regulation 950-5 (1991) provides that medical, psychiatric, and other information contained in the file is confidential, and may not be released absent the inmates written consent or court order, Mr. Chambers' Fifth Amendment claim is without merit. Appellant contends that for purposes of the regulation, a prosecutor's subpoena duces tecum to the DOC is a court order. Thus, the confidentiality provision is illusory in light of the prosecution's subpoena power.

We agree with the analysis of the district court that there is no evidence presented by Appellant that the confidentiality provision of Regulation 950-5 has been or ever will be breached. Further, we add that it is also dispositive of our inquiry that there is no compulsion for Fifth Amendment purposes. It has long been recognized that "[t]he (Fifth] Amendment speaks of compulsion." *Minnesota v. Murphy*, 465 U.S. 420, 427 (quoting United States v. *Monia*, 317 U.S. 424, 427). As recited above, Appellant has no right to earned time. The fact that prison officials refuse to confer a portion of the potential monthly earned time merely constitutes the denial of a privilege, and is thus not a compulsion to testify for purposes of the Fifth Amendment. *See Lustgarden v. Gunter*, 966 F.2d 552, 555 (10th Cir.) (no constitutional or inherent right to the privilege of parole).

In sum, we agree with the district court that there is no constitutional right to good or earned time credit. Accordingly, Appellant's due process and equal protection claims based upon the denial of earned time are not cognizable in a § 1983 action. Further, Appellant's contention that his Fifth Amendment privilege against self-incrimination was violated is meritless in light of the confidentiality provision of Regulation 950-5 and the fact that Appellant has not been adequately compelled for purposes of the Fifth Amendment.

AFFIRMED.

Entered for the Court

Oliver Seth
Circuit Judge